Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DONALD MARCUM,

Petitioner,

v.

COMMISSIONER, SOCIAL SECURITY ADMINISTRATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should grant a Writ of Certiorari so as to ensure conformity among the Circuits in addressing the presence of a mental impairment pursuant to 42 U.S.C. § 421(h) and 20 C.F.R. § 404.1520a?

LIST OF PARTIES

The Petitioner is Donald Marcum with the Respondent being Commissioner of Social Security.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
BASIS OF JURISDICTION IN THIS COURT	1
STATUTES AND REGULATIONS	2
STATEMENT OF THE CASE	3
ARGUMENT	7
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

CASES

Andrade v. Secretary, 985 F.2d 1045 (10th Cir. 1993) 9, 12, 13

DeVoll v. Commissioner, 98 F.3d 1341 (6th Cir. 1996)..11, 13

Hill v. Sullivan, 924 F.2d 972 (10th Cir. 1991) 7

Owen v. Chater, 114 F.3d 1188 (6th Cir. 1997) 8

Montgomery v. Shalala, 30 F.3d 98 (8th Cir. 1994) 9, 12, 13

Stambaugh v. Sullivan, 929 F.2d 292 (7th Cir. 1991)..9, 13

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 205(g) 3

42 U.S.C. § 405(g) 3, 4

42 U.S.C. § 421(h) 2, 8, 9, 11, 12

42 U.S.C. § 421(a)(2)..... 8

Federal Rule of Appellate Procedure 4(a)(1) 4

REGULATION

20 C.F.R. § 404.1520a 2, 7, 9, 13

OPINIONS BELOW

The judgment of the United States District Court for the Eastern District of Kentucky, Pikeville Division, was entered on October 30, 1998 and is unpublished. The opinion of the United States Court of Appeals for the Sixth Circuit was entered on January 18, 2000, with the decision upon Petition for Rehearing being entered on April 6, 2000. Neither decision of the United States-Court of Appeals for the Sixth Circuit was published.

BASIS OF JURISDICTION IN THIS COURT

This Petition seeks review of an opinion entered by the United States Court of Appeals for the Sixth Circuit on January 18, 2000, with the Sixth Circuit Order on Petition for Rehearing being entered on April 6, 2000. The Petitioner, Donald Marcum, seeks to invoke the jurisdiction of this Court to review the opinion of the United States Court of Appeals for the Sixth Circuit under 28 U.S.C. § 1254(1) which provides:

> "Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods: (1) by Writ of Certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree . . . "

STATUTES AND REGULATIONS

The federal statute involved in this review is 42 U.S.C. § 421(h) which provides:

> (h) Evaluation of mental impairments by qualified medical professionals
>
> An initial determination under subsection (a), (c), (g), or (i) of this section that an individual is not under a disability, in any case where there is evidence which indicates the existence of a mental impairment, shall be made only if the Commissioner of Social Security has made every reasonable effort to ensure that a qualified psychiatrist or psychologist has completed the medical portion of the case review and any applicable residual functional capacity assessment.

The federal regulation involved in this review is 20 C.F.R. § 404.1520a which in pertinent part provides:

> (d) Preparation of the document. A standard document outlining the steps of this procedure must be completed by us in each case at the initial, reconsideration, administrative law judge hearing, and Appeals Council levels (when the Appeals Council issues a decision).
>
> (1) At the initial and reconsideration levels the standard document must be completed and signed by our medical consultant. At the administrative law judge hearing level, several options are available:
>
> (i) The administrative law judge may complete the document without the assistance of a medical adviser;

(ii) The administrative law judge may call a medical adviser for assistance in preparing the document; or;

(iii) Where new evidence is received that is not merely cumulative of evidence already in your case file or where the issue of a mental impairment arises for the first time at the administrative law judge hearing level, the administrative law judge may decide to remand the case to the State agency for completion of the documentation and a new determination. Remand may also be made in situations where the services of a medical adviser are determined necessary but unavailable to the administrative law judge. In such circumstances, however, a remand may ordinarily be made only once.

(2) For all cases involving mental disorders at the administrative law judge hearing or Appeals Council levels, the standard document will be appended to the decision.

STATEMENT OF THE CASE

A.

Subject matter jurisdiction in the lower courts existed by virtue of § 205(g) of the Social Security Act, 42 U.S.C. § 405(g). Appellate jurisdiction in the United States Court of Appeals for the Sixth Circuit existed by virtue of Federal Rule of Appellate Procedure 4 and by virtue of § 205(g) of the Social Security Act, 42 U.S.C. § 405(g). As the judgment by the District Court was entered on October 30, 1998 and the Notice of Appeal with the District Court on December 23, 1998, the appeal to the United

States Court of Appeals was timely and appropriate subject matter and appellate jurisdiction therefore existed with the United States Court of Appeals for the Sixth Circuit. 42 U.S.C. § 405(g); Federal Rule of Appellate Procedure 4(a)(1).

B.

The Plaintiff, Donald Marcum, is currently 36 years of age with a birth date of December 1, 1961. The Plaintiff completed the eighth grade of formal education and testified that he could read and write fairly well. (T.E., p. 148.)[1]

The administrative law judge found that the claimant was suffering from asthma and degenerative disc disease which the administrative law judge found to be severe impairments. The administrative law judge found that the claimant's depression and other nerve problems did not present a medically determinable mental impairment. (T.E., p. 15). In finding no evidence of a medically determinable mental impairment, the administrative law judge stated that while the claimant had complained of depression, there was no history of psychiatric hospitalization and the claimant had not reported receiving any counseling and had not reported taking related medications. (T.E., pp. 17-18).

Mr. Marcum testified to back problems and that he had been having problems with his nerves, testifying that he stayed depressed a lot and did not sleep much. Mr.

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[1] The Transcript of Evidence is cited as T.E.

Marcum testified at the hearing that he was taking Amitriptyline, a nerve pill, for the problems with his nerves. (T.E., p. 156).

Mr. Marcum testified that he sleeps an average of three to four hours per night. Mr. Marcum further testified that he was continuing to see Dr. Salcido every two weeks and was looking into going to a pain management clinic for his pain problems. (T.E., pp. 159-161). Mr. Marcum testified that he had approximately 25 bad days a month with approximately five good days in one month. (T.E., p. 165).

The record reflects that the Plaintiff began treating with Dr. Richard Salcido, a Board certified orthopedic surgeon, on September 27, 1995.

On July 3, 1996, Dr. Salcido noted the claimant to be status post L4-5 lumbar discectomy with chronic pain. Dr. Salcido noted that Mr. Marcum was complaining of depression, denied any suicidal ideation, and was having non-restorative sleep. Dr. Salcido prescribed Amitriptyline 10-20 mg. q.h.s. to help with the non-restorative sleep. (T.E., p. 120).

Dr. Salcido again examined the Plaintiff on September 18, 1996 and noted that on the last visit of July 31, 1996, the Amitriptyline had been increased to 50 q.h.s. Mr. Marcum was reporting pain 50% worse from his last visit radiating from his back. Dr. Salcido noted that Mr. Marcum was now having some hip weakness and numbness on the anterior thigh and that he strongly suspected a new L2 radiculopathy. (T.E., p. 132).

On October 16, 1996, Dr. Salcido noted that Mr. Marcum was having L2 numbness in the right lower extremities, as well as hip flexor, abductor, and adductor weakness. An EMB was repeated but was unable to rule out a new L2 radiculopathy. The patient was continued on Amitriptyline at the previous dosage. (T.E., p. 141).

On October 30, 1996, Dr. Salcido recommended that Mr. Marcum continue on the Amitriptyline at the previous dosage for the non-restorative sleep. Dr. Salcido noted that, unfortunately, he had little else to offer Mr. Marcum at that time from a rehabilitation perspective. Considering the length of time since Mr. Marcum's injury, Dr. Salcido noted that Mr. Marcum's prognosis for improvement was poor and that he could possibly benefit in the future from referral to a pain management program for long-term management of his pain medication. (T.E., pp. 139-140).

The last report in the file from Dr. Salcido refers to his treatment of Mr. Marcum on May 21, 1997 in which he noted a repeat EMG showed suspicion of a L2 radiculopathy. Mr. Marcum continued with a pain level which was interfering with his functional status with sensory sensation being decreased in a L5-S1 distribution and reflexes being 1 plus in the Achilles bilaterally. Amitriptyline was continued at the 50 mg. dosage. (T.E., p. 143).

ARGUMENT

AS THE DECISION OF THE SIXTH CIRCUIT IS IN CONFLICT WITH OTHER UNITED STATES COURTS OF APPEALS ON THE SAME ISSUE AND IS FURTHER IN CONFLICT WITH A PREVIOUS DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, THIS COURT SHOULD GRANT A WRIT OF CERTIORARI SO AS TO ENSURE CONFORMITY BETWEEN THE VARIOUS CIRCUITS CONCERNING THE PROPER PROCEDURE FOR HANDLING A SOCIAL SECURITY CLAIM IN WHICH A MENTAL IMPAIRMENT IS ALLEGED FOR THE FIRST TIME BEFORE AN ADMINISTRATIVE LAW JUDGE.

In the Sixth Circuit's decision as rendered on January 18, 2000, the Sixth Circuit found that the administrative law judge was correct in finding that there was not substantial evidence of a mental impairment such that the administrative law judge should have referred the claimant out for evaluation of his mental impairment. The Petitioner would submit that such finding was in error and, furthermore, is not in conformity with a previous decision of the Sixth Circuit, nor is such decision in conformity with decisions from other Circuits.

When a record "contains evidence of a mental impairment that allegedly prevented the claimant from working, the secretary is required to follow the procedure for evaluating the potential mental impairment set forth in his regulations and to document the procedure accordingly. 20 C.F.R. § 404.1520a." *Hill v. Sullivan*, 924 F.2d 972, at 975 (10th Cir. 1991). The secretary must also comply

with all applicable procedures mandated by the statutes. 42 U.S.C. § 421(a)(2).

42 U.S.C. § 421(h) provides that where there is evidence which indicates the existence of a mental impairment, a determination that the claimant is not under a disability shall only be made if the Commissioner of Social Security has made every reasonable effort to ensure that a qualified psychiatrist or psychologist has completed the medical portion of the case review and any applicable residual functional capacity assessment. 42 U.S.C. § 421(h). 20 C.F.R. § 404.1520a provides for an administrative law judge to complete and attach the standard document evaluating mental impairment. 20 C.F.R. § 404.1520a.

In the matter at bar, although the claimant did present evidence of a mental impairment, the administrative law judge failed to make every reasonable effort to ensure that a qualified psychiatrist or psychologist had completed the medical portion of the case review and any applicable residual functional capacity assessment, and further failed to complete and attach to the hearing decision the standard document evaluating the mental impairment as required by 20 C.F.R § 404.1520a.

The Sixth Circuit has assumed that where a claim of mental impairment arises for the first time in proceedings before the administrative law judge, the administrative law judge would have an obligation to consult a mental health expert before completing the Psychiatric Review Technique Form (PRTF) if the claimant brings forth sufficient evidence to raise an inference that he suffers from a mental impairment. *Owen v. Chater*, 114 F.3d 1188 (6th Cir.

1997). Such a holding would be consistent with the holdings of the other federal circuits which have addressed this issue.

The Eighth Circuit, Tenth Circuit, and Seventh Circuit have all held that an administrative law judge is obligated to consult an expert where a mental impairment is first alleged while the claim is pending before the Office of Administrative Law Judges. *Montgomery v. Shalala*, 30 F.3d 98 (8th Cir. 1994); *Andrade v. Secretary*, 985 F.2d 1045 (10th Cir. 1993); *Stambaugh v. Sullivan*, 929 F.2d 292 (7th Cir. 1991). As stated by the Eighth Circuit, 42 U.S.C. § 421(h) declares that "in any case where there is evidence which indicates the existence of a mental impairment," an administrative law judge may not make an initial determination that the claimant is not disabled unless the administrative law judge 'has made every reasonable effort to ensure that a qualified psychiatrist or psychologist has completed the medical portion of the case review and any applicable residual functional capacity assessment.' " *Montgomery v. Shalala* at 101.

The administrative law judge is further required to complete and attach the standard document evaluating the mental impairment as required by 20 C.F.R. § 404.1520a. Where there is substantial evidence of a mental impairment, such failure to complete the form by the administrative law judge constitutes reversible error. *Stambaugh v. Sullivan*, 929 F.2d 292 (7th Cir. 1991).

The record does contain substantial evidence that the claimant does suffer from a mental impairment which affects his ability to engage in work-related activities. At the hearing in this matter, Mr. Marcum testified that he

was taking Amitriptyline for his nerve problems. Mr. Marcum testified that he stayed depressed a lot due to the fact that he could not work. (T.E., p. 156). In addition, Mr. Marcum testified that he has difficulty sleeping, getting no relief from the nerve medication. (T.E., pp. 156-157).

The medical records from the Plaintiff's treating orthopedic physician, Dr. Richard Salcido, confirm the claimant's complaints of a mental impairment. Dr. Salcido's records reflect that as of July 3, 1996, Mr. Marcum was complaining of depression and was having non-restorative sleep. Dr. Salcido prescribed Amitriptyline 10-20 mg. q.h.s. (T.E., p. 120). Dr. Salcido examined the claimant on September 18, 1996, noting that on July 31, 1996, the Amitriptyline had been increased to 50 q.h.s. (T.E., p. 132).

Further records from Dr. Salcido reflect continuing treatment of the nerve problems through the last treatment note in the record of Dr. Salcido dated May 21, 1997, reflecting that Mr. Marcum was continuing to receive Amitriptyline at the 50 mg. dosage. As can be seen by the above, the claimant has been treated for a mental impairment by his treating physician since July 3, 1996 (T.E., p. 120) through at least May 21, 1997, the date of the last treatment note of Dr. Salcido which is in the record. (T.E., p. 143). Dr. Salcido's records further reflect that the nerve medication which was prescribed had to be more than doubled in dosage and continued to be taken at the highest dosage prescribed almost one year later. Thus, the records of Dr. Salcido would indicate that the claimant has not received any significant relief, if any, for his

mental impairment from the nerve medication prescribed by his physician.

The administrative law judge, in finding no evidence of a medically determinable mental impairment, found that the claimant had not reported taking any related medication. (T.E., pp. 17-18). Such finding was not based upon substantial evidence. The claimant testified at the hearing that he was taking a nerve medication, Amitriptyline. (T.E., p. 156). The medical records of Dr. Salcido reflect that Dr. Salcido prescribed said medication beginning on July 3, 1996, and continued through at least May 21, 1997, with the dosage being more than doubled during this time period.

The claimant would submit that such evidence of an alleged mental impairment did constitute substantial evidence of a mental impairment. The claimant would point out that the Sixth Circuit, in an unpublished decision, *DeVoll v. Commissioner*, 98 F.3d 1341 (6th Cir. 1996) found that similar evidence did present substantial evidence of whether a mental impairment was present such that the claim should be remanded for the appropriate procedures to be taken by the administrative law judge in accord with 42 U.S.C. § 421(h).

In *DeVoll*, the only evidence of a mental impairment during the claimant's insured period was that she had complained to her treating physician that her nerves were bad, one physician had noted her "inappropriate" laughter, and one physician had noted that the patient had come to his office crying and was tremendously depressed because of the continuation of pain, and thereafter prescribed therapy and antidepressants. In *DeVoll*,

the Court found that such evidence suggested the existence of a mental disability during her insured period and further found that the administrative law judge had erred in not making the appropriate referrals under 42 U.S.C. § 421(h).

More importantly for the purpose of this Petition for Writ of Certiorari, the Sixth Circuit's decision conflicts with the decision of other United States Courts of Appeals which have ruled upon the same matter. In the Tenth Circuit's decision in *Andrade v. Secretary of Health and Human Services*, 985 F.2d 1045 (10th Cir. 1993), the only evidence of a mental impairment consisted of the claimant's testimony at the hearing along with letters and handwritten treatment notes, most of which were illegible, from the claimant's physician. The claimant complained of depression and suicidal thoughts and also admitted to crying spells, feelings of worthlessness, and withdrawing from people when he felt bad. The only period of treatment had been treatment on a weekly basis for depression by the claimant's treating physician for a period of time beginning four months prior to the social security hearing. *Andrade v. Secretary*, 985 F.2d 1045 (10th Cir. 1993). The Tenth Circuit found that such evidence of a mental impairment did merit a remand for proper consideration of whether the claimant was suffering from a disabling mental impairment.

In the Eighth Circuit's decision in *Montgomery v. Shalala*, 30 F.3d 98 (8th Cir. 1994), the only evidence of a mental impairment was a disability examiner's consultation sheet which gave a history of treatment for depression in 1975 and 1988, with hospital records reporting a history of depression. The disability examiner only found

the claimant to be suffering from mild depression, most likely related to the claimant's economic situation. The Eighth Circuit found that the failure to complete a PRTF by the administrative law judge was reversible error such that the case should have been remanded.

The Seventh Circuit in *Stambaugh v. Sullivan*, 929 F.2d 292 (7th Cir. 1991) found that even where the only evidence of a mental impairment was that of alcoholism, the court found that the administrative law judge erred in failing to complete and attach the standard document evaluating the mental impairment as required by 20 C.F.R. § 404.1520a.

The Petitioner would submit that the evidence of a mental impairment in the present case is a much stronger case so as to substantiate a mental impairment that in the decision of the Eighth Circuit in *Montgomery*, the Tenth Circuit in *Andrade*, the Seventh Circuit in *Stambaugh*, or even the Sixth Circuit itself in *DeVoll*. In the present matter, the evidence reflects that the claimant, Donald Marcum, received treatment for a mental condition for a period of approximately 11 months. In addition, the claimant's treating physician, Dr. Richard Salcido, noted that Mr. Marcum was complaining of depression with non-restorative sleep and further noted that the nerve medication had to be increased from an initial dosage of 10 mg. per day to a dosage of 50 mg. per day at the time of Dr. Salcido's last treatment note on May 21, 1997. (T.E., pp. 120, 143).

The claimant would submit that a comparison of the Sixth Circuit's decision in the present case with the decisions cited from the Seventh, Eighth, the Tenth Circuits

shows that the Sixth Circuit is clearly in conflict with the other circuits which have spoken on the present issue. Thus, in order to afford consistency among the circuits for claimants seeking social security benefits who allege a disabling mental impairment, this Court should accept certiorati and rule upon this issue so as to ensure conformity among the various circuits.

Respectfully submitted,

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APPENDIX

Page

Decision of the United States Court of Appeals for the Sixth Circuit printed on 1/18/00.....App. 1

Notice of Decision by ALJ – unfavorable, 3/27/97.....App. 15

Action of Appeals Council on Request for Review, 1/27/98.....App. 32

Memorandum Opinion by U.S. District Court for the Eastern District of Kentucky, Pikeville Division, 10/30/98.....App. 36

Order on Petition for Rehearing entered by U.S. Court of Appeals for the Sixth Circuit on 4/6/00.....App. 46

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 98-6771

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DONALD MARCUM,
Plaintiff-Appellant,

v.

COMMISSIONER,
SOCIAL SECURITY
ADMINISTRATION,
Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of Kentucky

/

(Filed Jan. 18, 2000)

Before: Guy and Clay, Circuit Judges; and Beckwith,* District Judge.

Per Curiam. Plaintiff, Donald Marcum, appeals from the district court's judgment affirming the denial of his application for social security disability benefits. Plaintiff argues that the administrative law judge (ALJ) failed to (1) comply with regulations concerning the evaluation of an alleged mental impairment, (2) give proper consideration to the evidence in concluding that he did not meet the listings, (3) properly consider plaintiff's pain in evaluating whether he was disabled, (4) accurately pose a hypothetical describing plaintiff's impairments to the vocational expert, and (5) properly evaluate plaintiff's

* The Honorable Sandra S. Beckwith, United States District Court for the Southern District of Ohio, sitting by designation.

retained residual functional capacity for sedentary work in conformity with Social Security Ruling 96-9p. After review of the record and the arguments presented on appeal, we affirm.

I.

Plaintiff was 31-years of age at the time of the alleged onset of disability, had completed the eighth grade, and testified that he can read and write fairly well. Plaintiff has a history of asthma and reported that he smoked a pack of cigarettes per day. He had experience working as a mechanic and a truck driver. Plaintiff was employed as a mechanic in April 1993 when he sustained a back injury while lifting a brake drum and "spider." Although he returned to work for a time, he stopped working completely in July 1993 and underwent a laminectomy for a herniated L4-L5 disc in October 1993. After surgery, plaintiff complained of pain in the low back area and down his right leg.

A neurological examination in December 1993 showed slightly depressed right ankle reflex, positive straight leg raising on the right at 40 degrees, limited lumbar flexion, muscle spasm, tenderness, and decreased sensation in a patchy distribution over his right leg. An abnormal EMG showed chronic denervation and reinnervation potential on the right in an L5 and S1 distribution. Physical therapy and pain medication were prescribed. A consultative review for the Social Security Administration in February 1994 concluded that plaintiff could lift 10 pounds frequently, 20 pounds maximum, could sit for up

to 6 hours a day, and could stand or walk up to 6 hours a day.

An examination in June 1994 by Dr. Joseph Rapier for a workers' compensation insurer noted muscle spasms, a listing walk, limited range of motion, 2+ ankle reflexes, and decreased sensation in the right leg. Plaintiff reported lumbar back pain extending down his right leg and numbness in a "stocking" distribution. Dr. Rapier's assessment was that plaintiff would have a 26 percent permanent functional impairment, could lift 10 pounds occasionally, stand for less than 3 hours, and sit for less than about 6 hours.

Plaintiff was treated by Dr. Richard Salcido, a board certified orthopedic surgeon, for rehabilitation between September 1995 and October 1996. An EMG in October 1995 showed evidence of chronic right L5 radiculopathy with some reinnervation. Plaintiff exhibited subjective signs of radiculopathy, numbness and tenderness, and continued to report pain in his back and right leg. He was referred for intensive physical therapy. In April 1996, plaintiff was prescribed a TENS unit for pain and in June 1996 showed improved flexion and reported less pain. Dr. Salcido encouraged plaintiff to undertake a vigorous walking program.

Plaintiff was evaluated by Dr. Bruce Guberman on July 2, 1996. Plaintiff walked with a limping gait, had lumbar muscle spasms and tenderness, hip tenderness, limited range of motion, and weakness in his right leg. Guberman noted motor and reflex abnormalities suggestive of nerve root damage, but found no sensory abnormalities. In assessing plaintiff's ability to do work-related

activities. Guberman indicated plaintiff could lift 10 pounds frequently, 20 pounds maximum, could stand for total of 2 hours out of an 8-hour day, and could sit a total of 6 hours out of an 8-hour day with breaks. Other "postural" requirements could be performed only occasionally (*i.e.*, bending and crouching). Although Dr. Guberman opined that plaintiff was capable of light exertional work, the ALJ rejected that conclusion and found plaintiff was capable of performing only limited sedentary work.

On July 31, 1996, Dr. Salcido noted normal reflexes and sensation, diffuse tenderness, and flexion to 60 percent. At that time, he also noted that plaintiff complained of "some depression," denied suicidal ideation, and was having nonrestorative sleep. Plaintiff was prescribed 10 to 20 mg. of Amitriptyline at bedtime "to help with nonrestorative sleep." When next seen in September, plaintiff reported worsened pain, weakness, and loss of sensation in his right hip suggestive of a new L2 radiculopathy. However, a subsequent EMG was inconclusive and a new MRI showed no evidence of chronic disc herniation. In October 1996, an examination showed muscle weakness (5/4), decreased sensation in the right thigh in a "L2-ish" distribution, and plaintiff reported he could walk only about 100 feet and sit about 15 minutes. At that time, Dr. Salcido indicated he had no further rehabilitation to offer plaintiff and suggested a referral to a pain management clinic. The Amitriptyline was continued for nonrestorative sleep. In May 1997, plaintiff was seen again by Dr. Salcido, who noted that plaintiff continued to report L2 radicular pain with numbness and weakness

that interfered with his functional ability. Plaintiff's muscle strength, however, was 5/5. Plaintiff continued to take 50 mg. of Amitriptyline at bedtime to help with non-restorative sleep.

Plaintiff filed an application for disability benefits in December 1993, that was denied both initially and upon reconsideration. At the hearing before the ALJ in November 1996, plaintiff testified that because his back pain became worse after the surgery he did not want to undergo a second surgery. Although the TENS unit helped relieve the pain, the pain never went completely away. Plaintiff testified that he could walk only about 100 feet, sit about 15 minutes, and could comfortably lift about 10 pounds. The ALJ observed that plaintiff did not appear to be in discomfort during the hearing even though plaintiff said he was having a "bad day." Plaintiff testified that he watched television, limited his driving, and engaged in no activities, but that he could cook and dress himself. When specifically asked if he had problems with his "nerves," plaintiff said he was depressed a lot. He has not, however, received any psychiatric treatment or counseling.

The ALJ found that although the medical evidence established plaintiff had severe degenerative disc disease and asthma, his impairments did not meet any of the listings. The ALJ also found that plaintiff's complaints of pain and other symptoms were not fully credible. The vocational expert testified from a hypothetical that, based upon plaintiff's residual functional capacity, there were a significant number of sedentary jobs plaintiff could perform; namely, cashier, information clerk, and office helper. Specifically, the ALJ found plaintiff was restricted

to lifting 10 pounds occasionally and 5 pounds frequently; walking or standing one hour at a time without interruption and 2 hours total; sitting 6 out of 8 hours with no more than 2 or 3 uninterrupted hours; could only occasionally perform activities such as climbing stairs, stooping, bending, etc; may never climb or crawl; and must avoid extreme variations in temperatures, dampness, vibration, fumes, odors, dust, hazardous machinery, and driving.

Based upon plaintiff's capacity for limited sedentary work and his age, education, and work experience, the ALJ concluded that there were a significant number of sedentary jobs in the national economy that he could perform and denied the application for disability benefits. After the Appeals Council denied plaintiff's request for review in January 1998, plaintiff filed this action. On cross-motions for summary judgment, the district court affirmed the denial of benefits and this timely appeal followed.

II.

We must affirm the Commissioner's decision absent a determination that the Commissioner failed to apply the proper legal standards or that the Commissioner's findings of fact were not supported by substantial evidence in the record. *See Walters v. Commissioner of Soc. Sec.*, 127 F.3d 525, 528 (6th Cir. 1997). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Upon examination of the administrative record as a whole, the Commissioner's findings

must be affirmed if they are supported by substantial evidence even if we would decide the matter differently and even if substantial evidence also supports the opposite conclusion. *See Cutlip v. Secretary of Health and Human Servs.*, 25 F.3d 284, 286 (6th Cir. 1994). We may not review the case *de novo*, resolve conflicts in evidence, or decide questions of credibility. *See Walters*, 127 F.3d at 528. After careful review of the administrative record in this case, we find that the Commissioner's findings are supported by substantial evidence. We turn to plaintiff's specific claims of error.

A. Mental Impairment

Plaintiff's application for benefits did not claim disability due to a mental impairment. The ALJ observed that plaintiff complained of depression at the hearing, but had no history of psychiatric hospitalization, counseling, or psychiatric medication. Plaintiff contends that remand is required because the ALJ found no medically determinable mental impairment without having plaintiff evaluated by a qualified psychiatrist or psychologist and without completing the Psychiatric Review Technique Form (PRTF, required by social security regulations. The critical inquiry is what quantum of evidence of a possible mental impairment is necessary to invoke the requirements of 42 U.S.C. § 421(h) and 20 C.F.R. § 404.1520a (1999). Section 421(h) provides that:

> An initial determination under subsection (a), (c), (g), or (i) of this section that an individual is not under disability, in any case where there is evidence which indicates the existence of a mental impairment, shall be made only if

> the Secretary has made every reasonable effort to ensure that a qualified psychiatrist or psychologist has completed the medical portion of the case review and any applicable residual functional capacity assessment.

This court recently left unanswered the question of whether an ALJ, confronted with a claim of a mental impairment raised for the first time at the hearing, has an obligation to consult with mental health experts before completing the PRTF. *See Owen v. Chater, Comm'r of Soc. Sec.*, No. 96-5571, 1997 WL 251918, at *4 (6th Cir. May 13, 1997) (per curiam). Rather, the court concluded that any such obligation would arise only "if the claimant brings forth sufficient evidence to raise an inference that he suffers from a mental impairment." *See id.* In *Owen*, a letter from the plaintiff's treating physician suggested that it was "quite possible" that plaintiff had some form of depression. This was not sufficient to raise an inference of a mental impairment.

In this case, the records indicate a single report to Dr. Salcido of some depression and reports of nonrestorative sleep. Plaintiff was prescribed 10 to 20 mg. of Amitriptyline at bedtime for his nonrestorative sleep, which was increased to 50 mg. at bedtime a few months later. At the hearing, plaintiff was asked:

> Q: Okay. Now, the amitriptyline, I guess, that's normally called a nerve pill. Are you having some problems with your nerves?
>
> A: Yeah. I stay depressed a lot.
>
> Q: Okay. Where you can't work?
>
> A: Yes, sir.

(J.A. at 156.) Plaintiff argues on appeal that since Amitriptyline is an anti-depressant with sedative effects the ALJ's finding that plaintiff did not take any psychiatric medication was not supported by substantial evidence. We disagree. The record indicates that plaintiff was prescribed and took the medication before bed as a sleep aid, although it did not really help him sleep more than 3 to 4 hours at night.[1] Despite plaintiff's claim that depression was a mental impairment that affected his residual functional capacity, there was not sufficient evidence in the record to raise an inference that plaintiff suffered from a mental impairment.[2]

Plaintiff relies upon several cases from other circuits in which the courts found the ALJ had failed to follow the proper procedures in evaluating a potential mental impairment. We find those cases distinguishable because they involved significant evidence of a possible mental impairment that allegedly prevented the claimant from

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[1] The ALJ elicited further testimony that plaintiff drank 7 to 8 cups of coffee a day, engaged in no activity, and smoked two packs of cigarettes a day.

[2] In his reply brief on appeal, plaintiff asserts for the first time that the ALJ erred in not obtaining a mental health expert's consultation because (1) sleep disorders are recognized by the DSM-IV and (2) without a professional evaluation it is unknown whether the plaintiff has a sleep disorder. We decline to address the ALJ's alleged failure to investigate or seek consultation concerning an alleged mental impairment that was not asserted in the administrative proceedings. Nor would we be inclined to require consultation whenever a claimant reported problems sleeping. Further, because this argument presents a speculative claim of mental impairment based on a sleep disorder remand is not warranted.

working. *See Plummer v. Apfel*, 186 F.3d 422, 432 (3rd Cir. 1999) (ALJ did not fulfill duty to explore alleged impairment when record contained evidence of history of diagnosis and treatment for anxiety disorder, depression, panic attacks, and current treatment for depression with multiple anti-depressants); *Montgomery v. Shalala*, 30 F.3d 98 (8th Cir. 1994) (ALJ erred in not getting mental evaluation or completing PRTF when plaintiff diagnosed with somatoform disorder, had history of treatment for depression, and a suicide attempt); *Andrade v. Secretary of Health and Human Servs.*, 985 F.2d 1045 (10th Cir. 1993) (ALJ abused discretion by assessing residual functional capacity without assistance of a mental health professional when there was evidence of depression, several months of weekly treatment, and letter offered at hearing stating plaintiff was totally mentally disabled); *Hill v. Sullivan*, 924 F.2d 972 (10th Cir. 1991) (ALJ erred when physician/psychiatrist included in diagnosis of chronic fatigue that possibly more likely chronic mental depression, and family testified plaintiff could not stay awake and could not work because of fatigue).

B. Listed Impairments

Plaintiff contends that the ALJ failed to properly consider the medical evidence before finding that plaintiff's back condition did not meet section 1.05C of the listed impairments, 20 C.F.R., pt. 404, subpt. P, app. 1. Listing 1.05 includes:

> C. Other vertebrogenic disorders (e.g., herniated nucleus puplosus, spinal stenosis) with the following persisting for at least 3 months

> despite prescribed therapy and expected to last 12 months. With both 1 and 2:
>
> 1. Pain, muscle spasm, and significant limitation of motion in the spine; and
>
> 2. Appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss.

Plaintiff must meet each element of a listing in order to establish disability based upon a listed impairment. *See Hale v. Secretary of Health and Human Servs.*, 816 F.2d 1078 (6th Cir. 1987). While there was evidence of some limited muscle weakness and some sensory and reflex loss at times, there was no evidence of significant *motor loss*. The ALJ's written decision considered the medical evidence concerning plaintiff's back condition and the ALJ's finding was supported by substantial evidence in this regard.

C. Disabling Pain

Plaintiff argues that the ALJ failed to properly consider his subjective reports of disabling pain or the medical evidence from his treating physician in accordance with 42 U.S.C. § 423(d)(1)(A). The standard for evaluating subjective complaints of disabling pain was articulated by this court in *Duncan v. Secretary of Health and Human Services*, 801 F.2d 847, 853 (6th Cir. 1986).

> First, we examine whether there is objective medical evidence of an underlying medical condition. If there is, we then examine: (1) whether objective medical evidence confirms the severity of the alleged pain arising from the condition; and (2) whether the objectively established medical condition is of such a severity that it can

> reasonably be expected to produce the alleged disabling pain.

Credibility determinations regarding a plaintiff's subjective complaints rest with the ALJ. *See Siterlet v. Secretary of Health and Human Servs.*, 823 F.2d 918, 920 (6th Cir. 1987).

Certainly, there was objective medical evidence that plaintiff suffered underlying degenerative disc disease and there were consistent reports from plaintiff of chronic pain for which he was prescribed a TENS unit and pain medication. There was, however, neither objective medical evidence confirming the severity of the alleged pain, nor evidence that plaintiff's back condition was of such a severity that it could reasonably be expected to produce disabling pain. None of the medical evaluations of plaintiff's restrictions concluded that plaintiff was disabled from all work. Even Dr. Salcido did not opine that plaintiff was totally disabled. The several examinations conducted to evaluate plaintiff's restrictions concluded that plaintiff could at least perform sedentary work with some restrictions. While plaintiff testified that he could sit for only 15 minutes and could walk only 100 feet, Dr. Salcido observed improvement in plaintiff's flexion and strength and recommended that he undertake a vigorous walking program. Further, the ALJ observed that plaintiff did not appear to be in discomfort at the hearing, despite reporting that he was having a bad day. We conclude that the ALJ's finding that plaintiff was not disabled was supported by substantial evidence in this case.

D. Vocational Expert

Plaintiff contends that the Commissioner's decision should be reversed because it was based upon the answer of the vocational expert to an inaccurate hypothetical question. *See Varley v. Secretary of Health and Human Servs.*, 820 F.2d 777 (6th Cir. 1987). The question, plaintiff claims, was not accurate because the ALJ failed to include any possible psychological problems or restrictions applicable to a mental impairment. Since there was no substantial evidence that depression affected plaintiff's residual functional capacity, the ALJ's hypothetical was not made inaccurate by the failure to include reference to plaintiff's complaint of depression.

E. Social Security Ruling 96-9p

Plaintiff argues that the ALJ's decision is inconsistent with the recognition in Social Security Ruling 96-9p that an inability to sit for a total of 6 hours of an 8-hour work day erodes a claimant's unskilled sedentary occupational base. Specifically, Ruling 96-9p states that when an individual is unable to perform substantially all of the sedentary occupations listed, the individual will be unable to perform the full range of sedentary work and his occupational base will be eroded by the additional limitations or restrictions. As the Commissioner observes, however, Ruling 96-9p provides further that "the mere inability to perform substantially all sedentary unskilled occupations does not equate with a finding of disability."

The ALJ accepted the sedentary exertional limitations that Dr. Rapier indicated in his 1994 evaluation, including that plaintiff could sit "LESS" than "ABOUT 6 hrs." The

ALJ's findings, as well as the hypothetical posed to the vocational expert, specifically limited plaintiff to sitting a total of 6 out of 8 hours with the ability to alternate sitting and standing every 2 to 3 hours. Even with the limitations in sitting, the vocational expert found there were still a substantial number of sedentary jobs that plaintiff could perform.

AFFIRMED.

SOCIAL SECURITY ADMINISTRATION

[SEAL]

Refer to:
406-98-7278

Office of Hearings and Appeals
1108 3rd Ave., Ste. 400
Huntington, WV 25701
Phone: (304) 529-5531
Date:

Donald Marcum
PO Box 98
Inez, KY 41224

MAR 27 1997

NOTICE OF DECISION – UNFAVORABLE

I have made the enclosed decision in your case. Please read this notice and the decision carefully.

If You Disagree With The Decision

If you do not agree with my decision, you may file an appeal with the Appeals Council.

How To File An Appeal

To file an appeal you or your representative must request that the Appeals Council review the decision. You must make the request in writing. You may use our Request for Review form, HA-520, or write a letter.

You may file your request at any local Social Security office or a hearing office. You may also mail your request to the Appeals Council, Office of Hearings and Appeals, 5107 Leesburg Pike, Falls Church, VA 22041-3255. Please put the Social Security number shown above on any appeal you file.

Time To File An Appeal

To file an appeal, you must file your request for review **within 60 days** from the date you get this notice.

The Appeals Council assumes you got the notice 5 days after the date shown above unless you show you did not get it within the 5-day period. The Council will dismiss a late request unless you show you had good cause for not filing it on time.

Time To Submit New Evidence

You should submit any new evidence you wish to the Appeals Council to consider **with** your request for review.

How An Appeal Works

Our regulations state the rules the Appeals Council applies to decide when and how to review a case. These rules appear in the Code of Federal Regulations, Title 20, Chapter III, Part 404, Subpart J.

If you file an appeal, the Council will consider all of my decision, even the parts with which you may agree. The Council may review your case for any reason. It will review your case if one of the reasons for review listed in our regulations exists. Section 404.970 of the regulations lists these reasons.

Requesting review places the entire record of your case before the Council. Review can make any part of my decision fully or partially favorable or unfavorable to you.

On review, the Council may itself consider the issues and decide your case. The Council may also send it back to an Administrative Law Judge for a new decision.

The Appeals Council May Review The Decision On Its Own

The Appeals Council can review my decision even without your request to do so. If it decides to do that, the Council will mail you a notice about its review within 60 days from the date of this notice.

If No Appeal And No Appeals Council Review

If you do not appeal and the Council does not review my decision on its own motion, you will not have a right to court review. My decision will be a final decision that can be changed only under special rules.

New Application

You have the right to file a new application at any time, but filing a new application is not the same as appealing this decision. If you disagree with my decision and you file a new application instead of appealing, you might lose some benefits, or not qualify for any benefits. My decision could also be used to deny a new application for insurance benefits, if the facts and issues are the same. So, if you disagree with this decision, you should file an appeal within 60 days.

If You Have Any Questions

If you have any questions, you may call, write or visit any Social Security office. If you visit an office, please bring this notice and decision with you. The telephone number of the local office that serves your area is (606) 886-8525. Its address is Soc. Sec. Adm./

OB24 DO, US Norht [sic] Auxier Road, Prestonsburg, KY 41653.

M. H. Cherry
Administrative Law Judge

Enclosures

cc: Leonard Stayton
PO BOX 1386
Inez, KY 41224

SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals

DECISION

IN THE CASE OF	CLAIM FOR
Donald Marcum	Period of Disability and
(Claimant)	Disability Insurance Benefits
	406-98-7278
(Wage Earner)	(Social Security Number)

This case is before the Administrative Law Judge upon a request for hearing. The Administrative Law Judge has carefully considered all the documents identified in the records as exhibits, the testimony at the hearing, and arguments presented.

ISSUES

The general issues are whether the claimant is entitled to a period of disability and disability insurance benefits

under Sections 216(i) and 223, respectively, of the Social Security Act, as amended.

PROCEDURAL HISTORY-JURISDICTION

The claimant applied for disability insurance benefits on December 3, 1993. This application was denied both initially and upon reconsideration and the claimant requested a hearing on October 3, 1995. A hearing was held in Prestonsburg, Kentucky on November 22, 1996, before the undersigned Administrative Law Judge. The claimant was present at the hearing and was represented by counsel.

After reviewing the evidence and the claimant's testimony, the undersigned finds that jobs exist in significant numbers in the regional and national economy which the claimant can perform despite his limitations. The claimant is therefore, not disabled within the meaning of the Social Security Act.

EVALUATION OF THE EVIDENCE

The claimant is presently 35 years of age and was 31 years of age on his alleged onset date. The claimant has a 9th grade or limited education. He has past work experience as a mechanic and truck driver. A review of the evidence of record indicates the claimant has not been engaged in substantial gainful activity since July 12, 1993. The Regulations provide a five-step evaluation process for the Administrative Law Judge to follow in reviewing whether the claimant is disabled (20 CFR 404.1520(a)). The first consideration is whether the claimant has been

engaging in a substantial gainful activity and already been resolved in the claimant's favor.

The next step in the evaluation sequential requires a determination as to whether the claimant has a severe impairment. A severe impairment is defined as an impairment or combination of impairments which significantly limits the ability to perform basic work-activity on a sustained basis. The evidence of record indicates that the claimant has complained of symptoms of depression, degenerative disc disease, and asthma. Based on a review of all the evidence and the undersigned finds that the claimant has impairments which are severe and resolves the second step in the claimant's favor.

Step three of the sequential evaluation requires a determination as to whether the claimant's impairments either alone or in combination, meet or equal a listed impairment. The record does not present signs, symptoms or findings would meet or equal the criteria of any of the listed impairments at Appendix 1, Subpart P.

The next consideration is whether the claimant retains the residual functional capacity to engage in his past relevant work. As noted previously, the claimant has severe impairments, and the undersigned finds based a review of the medical evidence, that this would include the claimant's asthma and degenerative disc disease. Although the claimant complains of depression he has no history of psychiatric hospitalization, counseling, and has not reported taking any psychiatric medication. Absent further evidence, the undersigned does not find that this condition would present a medically determinable mental impairment.

The medical evidence includes a CT scan from July 16, 1993, which revealed degenerative changes (Exhibit 10). The claimant underwent a laminectomy at the Three Rivers Hospital on October 21, 1993 for excision of degenerative disc (Exhibit 11). The treatment records of Dr. J. Kalache, M.D., who reported that the claimant had been complaining of back pain for several years and reported that the claimant underwent physical therapy after his surgery (Exhibit 12). The treatment records of Dr. S. Deitch, M.D., indicate that on December 13, 1993, the claimant was evaluated and found to have a slightly depressed right ankle reflex and a limited range of motion in his back. Further physical therapy was recommended and it was reported on January 12, 1994, that the claimant would be prescribed a TEN's Unit (Exhibit 13).

The claimant was evaluated by Dr. J. Rapier, M.D., on June 14, 1994, who reported that upon examination the claimant displayed normal strength, decreased sensation in the right leg, and was diagnosed with degenerative disc disease with trauma. Dr. Rapier restricted the claimant to the sedentary range of exertion with additional restrictions (Exhibit 18). The claimant was also evaluated by Dr. B. Guberman, on July 2, 1996, who reported that the claimant retained range of motion abnormalities upon examination but had no confirmed sensory abnormalities. Dr. Guberman found that the claimant would be capable of light exertion lifting 20 pounds occasionally, and 10 pounds frequently (Exhibit 19).

Treatment records indicate that on October 25, 1995, the claimant continued to undergo physical therapy and no current recommendation existed for neurosurgery. An

April 24, 1996, treatment note indicates that the claimant's physician had elected not to perform any further surgery and at that time a physical examination revealed that no sensory abnormalities. On June 5, 1996, it was reported that the claimant was doing well utilizing a TEN's Unit and was encouraged to involve himself in a vigorous walking program (Exhibit 20). Further treatment records from the Highlands Regional Medication Center indicate no significant improvement in the claimant's complaints (Exhibit 25). The undersigned notes that the State Agency consultant restricted the claimant to the light range of exertion which concurs with the evaluation with Dr. Guberman (Exhibit 15). The undersigned will rely on the more restricted assessment of Dr. Rapier. The undersigned has considered some of the restrictions from the consultative examiner but relies on the exertional restriction of Dr. Rapier who found the claimant is restricted to sedentary range of exertion, lifting 10 pounds occasionally and 5 pounds frequently. The claimant may walk/stand one hour without interruption or 2 hours total; and may sit 6-hours; and may alternate sitting/standing 2 to 3 hours without interruption; is limited in the ability to use the upper and lower extremities to 10 pounds; may only occasionally climb stairs, ramps, balance, stoop, bend, kneel, and crouch; may not climb ladders, ropes, scaffolds, or crawl; must avoid extremes in temperature, gases, etc., hazardous machinery, or unprotected heights, and driving.

Considering the claimant's residual functional capacity, the undersigned has considered the claimant's subjective complaints of pain and other symptoms as required by Social Security Rulings 96-7p and 96-3p (20 CFR 404.529).

The rulings require the evaluation of various factors including: the individual's daily activities; vocation, frequency, intensity of the individual's pain and other symptoms; factors that precipitate and aggravate the symptoms; the type, dosage, effectiveness, side-effects of any medications the individual takes or has taken to alleviate pain and other symptoms; treatment, medication, the individual receives or has received for the relief of pain and other symptoms; any measures of the treatment the individual uses or has used to relieve pain or other symptoms; and any other factors concerning the individual's functional limitations and restrictions due to pain or other symptoms.

The claimant complains of back injury which occurred on April 8, 1993. The claimant complains of sharp pain which occurs at the belt line and radiates to the right leg. The claimant also complains of depression. The claimant has undergone back surgery and utilizes a TEN's unit. The claimant takes pain medications and does not complaint of any side-effects.

The claimant estimates that he can sit 10 to 15 minutes, stand 10 to 15 minutes, and walk one hundred feet. The claimant has been vague regarding his activities of daily living but indicates that he can take care of his personal needs and drive.

In assessing the claimant's complaints of pain and other symptoms in accordance with the Ruling 96-7p and 96-3p, the undersigned does not find that it is appropriate to further reduce the claimant's residual functional capacity on this basis. The evidence is not consistent with the claimant's allegations of disabling impairments. The

medical evidence indicates that the claimant has complained of depression but has no history of psychiatric hospitalization, has not reported receiving any counseling, and has not reported taking related medications. The claimant reported a back injury on April 8, 1993, but reported that he was able to return to heavy work for three more months. The claimant then underwent a laminectomy. Dr. Deitch reported continued physical therapy would be needed and prescribed a TEN's unit. Dr. Rapier found that the claimant had range of motion and sensory abnormalities on the right leg and restricted the claimant to the sedentary range of exertion. Dr. Guberman did not find the presence of sensory abnormalities and found that the claimant could perform work at the light exertional range. A treatment note from April 24, 1996, from the Highlands Regional Medical Center also showed no sensory abnormalities. On June 5, 1996, a note indicated that the claimant's TEN's unit was effective in dealing with pain and that the claimant was encouraged to be on a vigorous walking program. No further surgery was recommended. There is no evidence of a pulmonary impairment and the claimant continues to smoke 2 packs of cigarettes per day. Despite the lack of consistent evidence the undersigned did restrict the claimant to the sedentary range of exertion. However, the claimant indicates very extreme restrictions of being unable to lift at all or to walk any significant distance which is not consistent with any of the medical evidence of record. The claimant also reported at the hearing that he was having a bad day with regard to pain but no discomfort was obvious at the hearing. The claimant has been vague regarding daily activities although he does drive and can take care of his

personal needs. After a consideration of all factors, the undersigned finds no reason to further restrict the claimant residual functional capacity on the basis of his subjective complaints.

Based on the testimony of vocational expert at the hearing, the claimant's past relevant as a truck driver and mechanic was medium to heavy in exertion. Since the claimant's residual functional capacity restricts him to a sedentary range of exertion, the undersigned finds the claimant would be capable of returning to his prior work. Therefore, the claimant has met his burden of production of evidence and has demonstrated by substantial evidence that he is incapable of returning to his past relevant work. Burden of production of evidence now shifts to the Commissioner of Social Security Administration to demonstrate the various significant number of jobs available in the national and regional economies that the claimant would be able to perform.

The first part of the final step of the sequential evaluation is to determine whether the grig [sic] rule would direct a finding of disability based solely on the exertional, vocational criteria. Considering the claimant's age at his onset date of 31 years of age, 9th grade limited education, past work experience, and functional capacity for sedentary work, the undersigned finds that Rule 201.25 applies and directs a finding of not disabled. However, the Grid Rules are applicable only in the absence of nonexertional impairments. Thus, the claimant has nonexertional impairments and the Grid Rules may only be used as a framework.

The vocational expert was asked to consider the claimant's age of 31 years on his alleged onset date, limited education, his residual functional capacity for sedentary work, his past work experience, and to assume the claimant may walk/stand one hour without interruption and 2 hours total; may sit 6 of 8 hours; may alternate sitting/standing 2 to 3 hours without interruption; is limited in his ability to use the upper and lower extremities to 10 pounds; and may only occasionally climb ramps, stairs, balance, stoop, bend, kneel and crouch; may never climb ladders, ropes, scaffolds, or crawl; and must avoid extremes in temperatures, dampness, wetness, or humidity, vibration, fumes, odors, dust, gases, etc., hazardous machinery or unprotected heights, and driving. The vocational expert responded that the claimant could be expected to perform 90% of the 200 unskilled sedentary jobs as noted by the Commissioner in the national economy. As examples of such jobs in the regional (defined as Kentucky) in the national economy the vocational expert cited: sedentary cashier 12,000, 556,000; sedentary information clerk, 1,000-1500, 50,000-51,000; and sedentary office helper, 4,300, 300,000.

Based on the hypothetical question presented, the undersigned notes the testimony of vocational expert and finds that the Commissioner has met her burden of producing the evidence and has established by substantial evidence that there are a significant number of jobs in the national and regional economies which the claimant would be able to perform. The claimant is accordingly not disabled within the meaning of the Social Security Act.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following finding:

1. The claimant met the disability insured status requirements of the Act on July 12, 1993, the date the claimant stated he became unable to work, and continues to meet them through December 31, 1996.

2. The claimant has not engaged in substantial gainful activity since July 12, 1993.

3. The medical evidence establishes that the claimant has severe degenerative disc disease and asthma, but that he does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4.

4. A review of the claimant's testimony and the document of the evidence indicate that the claimant's objective complaints of pain and other symptoms are not fully credible.

5. The claimant is restricted to the sedentary exertional range lifting 10 pounds occasionally and 5 pounds frequently; may walk/stand one hour without interruption and 2 hours total; and sit 6 to 8 hours; may alternate sitting/standing without interruptions 2 to 3 hours; is limited in the ability to use the upper and lower extremities top 10 pounds; may only occasionally climb stairs, ramps, bounce, stoop, bend, knee, crouch, and crawl; may never climb ladders, ropes, scaffolds or crawl; must avoid extreme in

temperatures, dampness, wetness or humidity, vibration, fumes, odors, dust, gases, etc., hazardous machinery in unprotected heights, and driving (20 CFR 404.545).

6. The claimant is unable to perform his past relevant work as truck driver and mechanic.

7. The claimant is currently 35 years of age and was 31 years of age on his alleged onset which is defined as a younger person (20 CFR 404.1563).

8. The claimant has a 9th grade or limited education (20 CFR 404.1564).

10. The claimant does not have any acquired work skills which are transferable to the skilled or semiskilled work functions of other work (20 CFR 404.1568).

11. Based on an exertional capacity for sedentary work, and the claimant's age, education, and work experience, section 404.1569 and Rule 201.25, Table No. 1, Appendix 2, Subpart P, Regulations No. 4 would direct a conclusion of "not disabled."

12. Although the claimant's additional nonexertional limitations do not allow him to perform the full range of sedentary work, using the above-cited rule as a framework for decisionmaking, there are a significant number of jobs in the national economy which he could perform. Examples of such jobs are: sedentary cashier, sedentary information clerk, and sedentary office helper.

13. The claimant was not under a "disability," as defined in the Social Security Act, at any

time through the date of this decision (20 CFR 404.1520(f)).

DECISION

It is the decision of the Administrative Law Judge that, based on the application filed on December 3, 1993, the claimant is not entitled to a period of disability or disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act.

/s/ Mack H. Cherry
Mack H. Cherry
Administrative Law Judge
Office of Hearings and Appeals
1108 3rd Ave., Ste. 400
Huntington, WV 25701

_____
Date

LIST OF EXHIBITS

DONALD MARCUM	406-98-7278
(Claimant)	(Social Security Number)
(Wage Earner Leave blank if Title XVI)	(X-Reference: Social Security No.)

Exhibit No.	Description	No of Pages
1	Application for disability insurance benefits, filed 12-03-93	4
2	Notice of denial, dated 02-10-94	3

3	Request for reconsideration, filed 03-01-94	1
4	Notice of reconsideration denial, dated 03-16-94	2
5	Request for hearing, filed 10-03-95	4
6	Right to a decision letter, dated 11-07-95	1
7	Earnings record, developed 12-06-93	1
8	Disability report, dated 11-05-93	8
9	Disability determinations, dated 02-10-94 and 03-11-94	4
10	X-ray report, dated 07-16-93	1
11	Hospital report, Three Rivers Medical Center, admission 10-21-93; discharge 10-22-93	8
12	Progress notes of Jean Kalache, M.D., dated from 04-28-93 through 11-29-93	5
13	Progress notes of Douglas Deitch, M.D., dated from 12-13-93 through 01-12-94	4
14	Consultant's remarks, James Ramsey, M.D., dated 01-26-94	1
15	Residual functional capacity assessment, James Ramsey, M.D., dated 02-02-94	9
16	Professional qualifications of Jean Kalache, M.D.	1
17	Professional qualifications of James T. Ramsey, M.D.	1

18	Medical report, Workers' Compensation Board, Joseph Rapier, Jr., M.D., dated 06-14-94, submitted by attorney	6
19	Consultative examination of Bruce Guberman, M.D., dated 07-02-96, received 09-30-96	7
20	Progress notes of Highland Clinic, dated from 09-13-95 through 07-31-96	13
21	Professional qualifications of Bruce Guberman, M.D.	1
22	Medical report of Richard Salcido, M.D., dated 09-18-96	2
23	Letter requesting Vocational Expert attendance at hearing	2
24	Resume of Vocational Expert	3
25	Medical Reports from Highlands Regional medical Center Dated 10/16/96 and 10/30/96	4

Leonard J. Stayton, Esq.
P.O. Box 1386
Inez, KY 41224

[SEAL] **SOCIAL SECURITY ADMINISTRATION**

Refer to:
TAHBH
406-98-7278

Office of
Hearings and Appeals
5107 Leesburg Pike
Falls Church, VA 22041-3255

JAN 27 1998

ACTION OF APPEALS COUNCIL
ON REQUEST FOR REVIEW

Mr. Donald Marcum
P.O. Box 98
Inez KY 41224

Dear Mr. Marcum:

The Appeals council has considered the request for review of the Administrative Law Judge's decision issued on March 27, 1997.

Social Security Administration regulations provide that the Appeals Council will grant a request for review where: (1) there appears to be an abuse of discretion by the Administrative Law Judge; (2) there is an error of law; (3) the Administrative Law Judge's action, findings, or conclusions are not supported by substantial evidence; or (4) there is a broad policy or procedural issue which may affect the general public interest. The regulations also provide that where new and material evidence is submitted with the request for review, the entire record will be evaluated and review will be granted where the Appeals Council finds that the Administrative Law Judge's actions, findings, or conclusion is contrary to the weight of the evidence currently of record (20 CFR 404.970).

The Appeals Council has concluded that there is no basis under the above regulations for granting your request for

review. Accordingly, your request is denied and the Administrative Law Judge's decision stands as the final decision of the Commissioner of Social Security in your case. In reaching this conclusion, the Appeals Council has considered the applicable statutes, regulations, and rulings in effect as of the date of this action.

The Appeals Council has also considered the additional evidence identified on the attached Order of the Appeals Council, but concluded that this evidence does not provide a basis for changing the Administrative Law Judge's decision.

If you desire a court review of the Administrative Law Judge's decision, you may commence a civil action by filing a complaint in the United States District Court for the judicial district in which you reside within sixty (60) days from the date of the receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing to the contrary is made. The complaint should name the Commissioner of Social Security as the defendant and should include the Social Security number(s) shown at the top of this notice. The right to court review is provided for in section 205(g) of the Social Security Act, as amended (42 U.S.C. 405(g)).

If you cannot file your complaint within 60 days, you may ask the Appeals Council to extend the time in which you may begin a civil action. However, the Council will only extend the time if you provide a good reason for not meeting the deadline. Your reason(s) must be set forth clearly in your request.

If a civil action is commenced, the Commissioner must be served by sending a copy of the summons and complaint by registered or certified mail to the General Counsel, Social Security Administration, Room 611, Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235 (See rules 4(c) and (i) of the Federal Rules of Civil Procedure). In addition, you must serve the United States Attorney for the district in which you file your complaint and the Attorney General of the United States, as provided in the Federal Rules of Civil Procedure.

Sincerely yours,

original signed by
Ira E. Ziporkin
Administrative Appeals Judge

cc:
Leonard J. Stayton, Esq.

SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS

ORDER OF APPEALS COUNCIL

In the case of	**Claim for**
Donald Marcum	Period of Disability
(Claimant)	Disability Insurance Benefits
	406-98-7278
(Wage Earner)	(Social Security Number)

(Leave blank if same as above)

Evidence in addition to that which was before the Administrative Law Judge has been received by the

Appeals Council and is hereby made a part of the record. That evidence consists of the following exhibit(s):

Exhibit AC-1 Medical report from Dr. Richard Salcido dated May 21, 1997

Date: JAN 27 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 98-102

DONALD MARCUM, PLAINTIFF,

VS. **MEMORANDUM OPINION**

KENNETH S. APFEL,
COMMISSIONER OF
SOCIAL SECURITY, DEFENDANT.

INTRODUCTION

(Filed Oct. 30, 1998)

The plaintiff brought this action to obtain judicial review of an administrative denial of his application for Disability Insurance Benefits (DIB). It is currently before the Court on cross-motions for summary judgment.

APPLICABLE LAW

The Sixth Circuit Court of Appeals has set out the steps applicable to judicial review of Social Security disability benefit cases:

1. Is the claimant currently engaged in substantial gainful activity? If yes, the claimant is not disabled. If no, proceed to Step 2. *See* 20 CFR 404.1520(b), 416.920(b).

2. Does the claimant have any medically determinable physical or mental impairment(s)? If yes, proceed to Step 3. If no, the claimant is not disabled. *See* 20 CFR 404.1508, 416.908.

3. Does the claimant have any severe impairment(s) – i.e., any impairment(s) significantly limiting the claimant's physical or mental ability to do basic work activities? If yes, proceed to Step 4. If no, the claimant is not disabled. *See* 20CFR 404.1520(c), 404.1521, 416.920(c), 461.921.

4. Can the claimant's severe impairment(s) be expected to result in death or last for a continuous period of at least 12 months? If yes, proceed to Step 5. If no, the claimant is not disabled. *See* 20 CFR 404.920(d), 416.920(d).

5. Does the claimant have any impairment or combination of impairments meeting or equaling in severity an impairment listed in 20 CFR Part 404, Subpart P, Appendix 1 (Listing of impairments)? If yes, the claimant is disabled. If no, proceed to Step 6. *See* 20 CFR 404.1520(d), 404.1526(a), 416.920(d), 416.926(a).

6. Can the claimant despite his impairment(s), considering his residual functional capacity and the physical and mental demands of the work he has done in the past, still perform this kind of past relevant work? If yes, the claimant was not disabled. If no, proceed to Step 7. *See* 20 CFR 404.1520(e), 416.920(e).

7. Can the claimant, despite his impairment(s), considering his residual functional capacity, age, education, and past work experience, do other work – i.e., any other substantial gainful activity which exists in the national economy? If yes, the claimant is not

disabled. *See* 20 CFR 404.1505(a), 404.1520(f)(1), 416.905(a), 416.920(f)(1).

Garner v. Heckler, 745 F.2d 383, 387 (6th Cir. 1984).

Applying this analysis, it must be remembered that the principles pertinent to the judicial review of administrative agency action apply. Review of the Commissioner's decision is limited in scope to determining whether the findings of fact made are supported by substantial evidence. *Jones v. Secretary of Health and Human Services*, 945 F.2d 1365, 1368-1369 (6th Cir. 1991). This "substantial evidence" is "such evidence as a reasonable mind shall accept as adequate to support a conclusion;" it is based on the record as a whole and must take into account whatever in the record fairly detracts from its weight. *Garner*, 745 F.2d at 387.

Another issue concerns the effect of proof that an impairment may be remedied by treatment. The Sixth Circuit has held that such an impairment will not serve as a basis for the ultimate finding of disability. *Harris v. Secretary of Health and Human Services*, 756 F.2d 431, 436 n.2 (6th Cir. 1984). However, the same result does not follow if the record is devoid of any evidence that the plaintiff would have regained his residual capacity for work if he had followed his doctor's instructions to do something or if the instructions were merely recommendations. *Id. Accord, Johnson v. Secretary of Health and Human Services*, 794 F.2d 1106, 1113 (6th Cir. 1986).

In reviewing the record, the Court must work with the medical evidence before it, despite the plaintiff's claims that he was unable to afford extensive medical work-ups. *Gooch v. Secretary of Health and Human Services*,

833 F.2d 589, 592 (6th Cir. 1987). Further, a failure to seek treatment for a period of time may be a factor to be considered against the plaintiff, *Hale v. Secretary of Health and Human Services*, 816 F.2d 1078, 1082 (6th Cir. 1987), unless a claimant simply has no way to afford or obtain treatment to remedy his condition, *McKnight v. Sullivan*, 927 F.2d 241, 242 (6th Cir. 1990).

Additional information concerning the specific steps in the test is in order.

Step six refers to the ability to return to one's past relevant category of work. *Studaway v. Secretary*, 815 F.2d 1074, 1076 (6th Cir. 1987). The plaintiff is said to make out a *prima facie* case by proving that he or she is unable to return to work. *Cf. Lashley v. Secretary of Health and Human Services*, 708 F.2d 1048, 1053 (6th Cir. 1983). However, both 20 CFR 416.965(a) and 20 CFR 404.1563 provide that an individual with only off-and-on work experience is considered to have had no work experience at all. Thus, jobs held for only a brief tenure may not form the basis of the Commissioner's decision that the plaintiff has not made out its case. *Id.* at 1053.

Once the case is made, however, if the Commissioner has failed to properly prove that there is work in the national economy which the plaintiff can perform, then an award of benefits may, under certain circumstances, be had. *E.g. Faucher v. Secretary of Health and Human Services*, 17 F.3d 171 (6th Cir. 1994). One of the ways for the Commissioner to perform this task is through the use of the medical vocational guidelines which appear at 20 CFR Part 404, Subpart P, Appendix 2 and analyze factors such

as residual functional capacity, age, education and work experience.

One of the residual functional capacity levels used in the guidelines, called "light" level work, involves lifting no more than twenty pounds at a time with frequent lifting or carrying of objects weighing up to ten pounds; a job is listed in this category it if encompasses a great deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls; by definition, a person capable of this level of activity must have the ability to do substantially all these activities. 20 CFR 404.1567(b). "Sedentary work" is defined as having the capacity to lift no more than ten pounds at a time and occasionally lift or carry small articles and an occasional amount of walking and standing. 20 CFR 404.1567(a), 416.967(a).

However, when a claimant suffers from an impairment "that significantly diminishes his capacity to work, but does not manifest itself as a limitation on strength, for example, where a claimant suffers from a mental illness . . . manipulative restrictions . . . or heightened sensitivity to environmental contaminants . . . rote application of the grid [guidelines] is inappropriate . . . " *Abbott v. Sullivan*, 905 F.2d 918, 926 (6th Cir. 1990). If this non-exertional impairment is significant, the Commissioner may still use the rules as a framework for decision-making 20 CFR Part 404, Subpart P, Appendix 2, Rule 200.00(e); however, merely using the term "framework" in the text of the decision is insufficient, if a fair reading of the record reveals that the agency relied entirely on the grid. *Ibid.* In such cases, the agency may be required to consult a vocational specialist. *Damron v. Secretary*, 778

F.2d 279, 282 (6th Cir. 1985). Even then, substantial evidence to support the Commissioner's decision may be produced through reliance on this expert testimony only if the hypothetical question given to the expert accurately portrays the plaintiff's physical and mental impairments. *Varley v. Secretary of Health and Human Services*, 820 F.2d 777 (6th Cir. 1987).

DISCUSSION

The plaintiff alleged disability primarily due to his musculoskeletal problems. (Tr. 63, 151). Although the Administrative Law Judge (ALJ) credited him with being unable to return to his past work, he found Marcum capable of a significant number of sedentary jobs based on Vocational Expert (VE) testimony. (Tr. 19, 21).

The VE had been asked to assume the existence of a plaintiff who had the following limitations: (1) the ability to stand or walk for no more than two hours in an eight-hour day, one hour at a time; (2) the capacity to sit for no more than six hours out of an eight-hour day, changing positions ever two to three hours; (3) a limitation to pushing and pulling no more than ten pounds; (4) an inability to use ladders, ropes and scaffolding; (5) an ability to only occasionally climb stairs, ramps, balance, stoop, bend, kneel, crouch or crawl; and (6) a need to avoid extremes of temperature, dampness, wetness and humidity, vibration, jars, jolts, fumes, odors, dust, gases, hazardous machinery, unprotected heights and driving. (Tr. 167). The expert indicated that 90 percent of the sedentary occupational base would still be available and

named examples of specific representative jobs. (Tr. 168-169).

The VE took into consideration virtually all the restrictions cited by Physical Examiners Guberman (Tr. 115-117)[1], all the restrictions noted by Orthopedic Specialist Rapier (Tr. 109) and far more restrictions than were referenced by Medical Advisor Ramsey (Tr. 94-101). Only if there were definite, contrary conclusions by treating sources would thus be an insufficient basis for the hypothetical question.

Treating sources do not present such a picture. The plaintiff underwent a laminectomy in October, 1993, immediately after which he was told to avoid prolonged sitting and engage in bed rest. (Tr. 76-82). Later in 1993, there was a question of chronic residual radiculopathy (Tr. 90-91) with possible MRI evidence of another extruded disc fragment (Tr. 84). However, his treating source for late 1995 and 1996 restricted him only from heavy labor (Tr. 128), noted a normal neurological status (Tr. 120) and later indicated an improvement in functional ability (Tr. 121, 122). An MRI done in October, 1996, as well as an EMG, did not demonstrate a definitely herniated disc (Tr. 139), yet the doctor opined that the patient's prognosis for improvement was "poor" due to his pain; however, it was noted that he might benefit from referral to a pain management program. (Tr. 140). No *specific* functional restrictions were mentioned. Accordingly, the evidence from treating sources presented a confusing

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[1] Guberman noted a total restriction on crawling (Tr. 116), the only one of his multiple restrictions not recited to the VE.

picture, insufficiently clear to present restrictions for the hypothetical question.

The plaintiff's contention regarding his psychiatric impairments and Listing of Impairment Section 1.05 are rejected for the reasons cited in the defendant's brief. *Memorandum in Support of the Commissioner's Decision,* Docket Entry No. 6, at pp.7-8, 9-10.

The decision will be affirmed.

This the 30 day of October, 1998.

/s/ G. Wix Unthank
G. WIX UNTHANK
SENIOR JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 98-102

DONALD MARCUM, PLAINTIFF,

VS. **ORDER**
(Filed Oct. 30, 1998)

KENNETH S. APFEL
COMMISSIONER OF
SOCIAL SECURITY, DEFENDANT.

* * * * * * * * * * * * *

In accordance with the Memorandum Opinion simultaneously entered in the above-styled action,

IT IS HEREBY ORDERED that:

(1) the Defendant's Motion for Summary Judgment is GRANTED;

(2) the Plaintiff's Motion for Summary Judgment is DENIED; and

(3) the administrative decision will accordingly be AFFIRMED by separate Judgment entered this same date.

This the 30 day of October, 1998.

/s/ G. Wix Unthank
G. WIX UNTHANK
SENIOR JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 98-102

DONALD MARCUM, PLAINTIFF,

VS. JUDGMENT
(Filed Oct. 30, 1998)

KENNETH S. APFEL
COMMISSIONER OF
SOCIAL SECURITY, DEFENDANT.

* * * * * * * * * * * * *

In compliance with Fed. R. Civ. P. 58,

IT IS HEREBY ORDERED AND ADJUDGED that:

(1) the administrative decision is AFFIRMED; and

(2) the above-styled action is STRICKEN from this Court's active docket. This the 30 day of October, 1998.

/s/ G. Wix Unthank
G. WIX UNTHANK
SENIOR JUDGE

[NOTICE IS HEREBY GIVEN OF THE ENTRY OF THIS ORDER OR JUDGMENT ON 10-30-98 LESLIE G. WHITMER, CLERK BY: /s/ Rita Thacker D.C.

98-6771

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DONALD MARCUM, Plaintiff-Appellant, v. COMMISSIONER, SOCIAL SECURITY ADMINISTRATION, Defendant-Appellee.	)	ORDER (Filed Apr 06 2000)

BEFORE: GUY and CLAY, Circuit Judges; and BECKWITH,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY
ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

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* Hon. Sandra S. Beckwith, United States District Judge for the Southern District of Ohio, sitting by designation.